53952

121 I.A. 32

ABST.

IN THE MATTER OF THE ESTATE OF RACHEL GINGOLPH, Deceased, BENJAMIN GINGOLD, Appellant, vs. JERRY GINGOLPH, ADMINISTRATOR, Appellee.	)	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY HON. RICHARD D. CIMBALA, JR. JUDGE PRESIDING

MR. PRESIDING JUSTICE BURMAN DELIVERED THE OPINION OF THE COURT.

In this action, Benjamin Gingold appeals from an order of the Probate Division holding him in contempt of court for failing to appear at a citation hearing.

The record discloses that Benjamin Gingold, a brother of the decedent and a resident of Paris, France, filed a petition on August 4, 1967, to vacate the declaration of heirship and for other relief. On that date, an order was entered by Judge Pavlik which recites:

> This cause coming on to be heard upon the motion of Benjamin Gingold for notice of proceedings and matters regarding a safe deposit box; and the oral motion of the Administrator for a citation to discover assets to be issued against Benjamin Gingold forthwith, and it appearing that said Benjamin Gingold has appeared in open court, and he having engaged counsel who has appeared this date and entered their appearance instanter in regard to said citation,
>
> For good cause shown, it is ordered that (1) A citation to discover assets is hereby issued against Benjamin Gingold instanter, and service of said citation having been waived by his attorney, the hearing on said citation is hereby assigned to Judge Kogut for disposition.
>
> (2) that Schiff, Hardin, Waite, Dorschel & Britton, attorneys for Benjamin Gingold, receive notice of all proceedings henceforth.
>
> (3) that the motion in regard to the safe deposit box be continued generally.

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In another order entered on the same date, a hearing on the citation was set for October 19, 1967. The hearings in the citation proceedings were continued from time to time by agreement or on the motion of one of the parties.

On May 14, 1968, Benjamin Gingold, by his attorney, Francis J. Mahon, moved to vacate the order of August 4, 1967, and subsequent orders pertaining to the issuance of a citation against him. In support of the motion it was stated that Section 183 of the Probate Act (Ill. Rev. Stat., 1967, ch. 3, §183) provides that the court shall order a citation to issue "[u]pon the filing of a verified petition." It was alleged that no verified petition had been filed and in fact no citation had ever issued. An answer was filed by the administrator, and the motion was denied after a hearing.

After Benjamin Gingold had failed to appear at about seven hearings on the citation, Judge Kogut entered an order on July 26, 1968, which denied the motion for another continuance. A rule was entered on the appellant for him to show cause why he should not be held in contempt for failure to appear at the citation hearings. On December 17, 1968, the matter came up upon the return of the rule, and the appellant did not appear. It was then ordered that he was adjudged to be in contempt of court. An order was entered on January 21, 1969, denying the motion to vacate the order of December 17, 1968. An appeal was taken from all orders pertaining to the citation proceedings.

It is the appellant's theory that the lack of a verified petition pursuant to Section 183 makes the citation void since the trial court would have no jurisdiction without a petition to enter a citation. If the citation is void, the order of contempt for failing to comply with it is, of course, also void.

The appellant relies on In Re Estate of Lindheimer, 36 Ill. App. 2d 434, 184 N.E.2d 759, in which the court, upon the motion of the executor, dismissed a claim against the inventoried estate because the claim was not properly verified as required by the Probate Act. In that case the executor contested the filing of an unverified petition. In the instant case the appellant submitted his person to the jurisdiction of the Probate Court by personally appearing in open court with counsel. He entered his appearance to the issuance of a citation, waived the filing of a formal petition for a citation, waived the service upon him of said citation and agreed to appear at a date set for the citation hearing. It was only after several continuances of that hearing that appellant filed a petition to vacate the citation order of August 4, 1967, to which he had agreed. No objection is made that the court did not have subject matter jurisdiction which would allow it to commence citation proceedings. Under the circumstances we hold that it was proper for the trial court to permit the appellant to waive strict compliance with Section 183 regarding the filing of pleadings. People ex rel. Hamer v. Jones, 39 Ill. 2d 360, 372, 235 N.E.2d 589, 596, and he has no cause to now complain.

Appellant relies on In Re Estate of Garrett, 81 Ill. App. 2d 141, 224 N. E.2d 654, in which an additional petition was necessary because the property in question was in possession not of the person against whom the citation was entered, but of others not before the court. In the case at bar, the appellant knew that the administrator sought to question him about assets held by him which allegedly belonged to the estate and he agreed

to appear and defend. He was aware of the issues he would be called upon to defend, unlike the third parties in the Garrett case.

Appellant also contests the service upon him of the rule to show cause by delivery to the concierge of his building in Paris while he was in Czechoslovakia. We hold that under the circumstances of this case there was effective personal service of the rule to show cause upon the appellant as required by the rules of the Supreme Court.

For the reasons stated all orders pertaining to the citation proceedings, including the order of December 17, 1968, finding Benjamin Gingold to be in contempt of court, are affirmed.

AFFIRMED.

MURPHY AND ADESKO, JJ. CONCUR.

(Abstract Only.)

121 I.A. 76

53678

ABST.

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, vs. C. W. HAMPTON, Defendant-Appellant.	)	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY. Hon. Jacques Heilingoetter, Presiding.

MR. JUSTICE LYONS DELIVERED THE OPINION OF THE COURT.

In a jury trial, the defendant was convicted of armed robbery [Ill. Rev. Stat. (1967), ch. 38, §18-2], judgment was entered on the verdict, and he was sentenced to two to five years in the State Penitentiary. He appeals contending: (1) his pre-trial identification by the victim was conducted in such a suggestive atmosphere as to deprive him of due process and a fair and impartial trial; (2) refusal of the Phoenix, Illinois, police to permit him to communicate with an attorney or member of his family while under arrest was a denial of due process and a violation of Ill. Rev. Stat. (1967), ch. 38, §103-3 (a) and (b); and (3) the State did not prove him guilty beyond a reasonable doubt.

Prior to trial, the defendant filed a written motion to suppress the identification testimony of the victim, Charles Peters. The motion alleged, inter alia, that Peters was unable to identify the defendant when they met in a one-man showup confrontation in the police station and that he did not identify the defendant until four hours later after the police had allegedly persuaded him to do so. Called as witnesses at the hearing on this motion were the victim, Charles Peters; the commander of the Phoenix Police Department, Captain Arthur Hooker; and the defendant.

Peters testified that he was robbed in Phoenix, Illinois, during the early morning hours of September 2, 1967 and his wallet

was taken; that about an hour later he went to the Phoenix Police Station arriving there around 6:00 or 6:30 A.M., spoke to two police officers, one of whom was Captain Hooker, and told them he had been robbed. He was told that the police had his wallet; they asked him if he could identify the robber; and he said yes. Captain Hooker then took him to view some men. Peters looked at one man who was being detained in a courtroom and he viewed others in the lockup but made no identification. He was then taken to look at the defendant who was alone in a cell. Peters told Hooker that the defendant was the robber and, in defendant's presence, he also said that he could not identify the second robber who always remained behind him.

The victim also testified that, at the time of the identification, he had some doubt that the defendant was one of the robbers but he was wearing the same clothing as one of them: a black hat and suit and dark glasses. Hooker never asked the accused to put on certain clothing. After Hooker returned his wallet, Peters admitted telling him that he was reluctant to sign a criminal complaint against the defendant because he had not been hurt in the robbery and he had recovered his wallet. Peters denied that this reluctance was due to his being unsure as to whether the defendant was one of the robbers. The victim again repeated, before the court, that when he identified the defendant in the police station, he was positive he had the right man.

The defendant testified that he was arrested by the Phoenix police during the morning hours of September 2, 1967, and was taken to the Phoenix Police Station; that he was asleep in his cell when Hooker came in with Peters at approximately 6:30 or 7:00 A.M. on that date; that Peters was unable to identify him even after Hooker asked the defendant to put on his dark glasses, coat and hat; that a woman viewed him later but she could

not identify him; that the defendant saw Peters and Hooker go into Hooker's office which was adjacent to the cell; and that the defendant heard part of a conversation between Peters and Hooker in which Peters asked for his wallet in that it contained his payroll check which he needed because he was married and had a family. Hooker allegedly refused to return the wallet until Peters signed a complaint against the defendant because Hooker said he knew they had the right man. The accused also testified that he did not see Peters again until sometime between 11:00 and 11:30 A.M. when everyone went, in a police car, to Robbins to pick up the alleged second robber and then continued on to Midlothian where Peters signed a complaint before the judge. In conclusion, the defendant testified that the Phoenix police never advised him of his constitutional rights while holding him in custody and that Peters did not receive his wallet until the judge, in Midlothian, detached and kept the check stub and returned the check and the wallet to the victim. When the defendant was asked, on cross-examination, if he ever sought an attorney while in custody, he replied that he had asked to make a telephone call.

The defendant thereupon rested on his motion to suppress and the People called Captain Hooker. He testified that he placed the defendant under arrest after seeing some events, involving Mr. Peters, take place in a tavern parking lot located in Phoenix, Illinois on September 2, 1967, at approximately 6:30 A.M.; that he took the defendant to the Phoenix police station and that Peters arrived about an hour later to report that he had been robbed by two men and had lost his wallet. Hooker stated that Peters told him he could identify only one of the two men since the second robber always stood behind him. At the station, Peters viewed five men in one room but could not recognize anyone. It was only after going to the third cell block that he said the man

there was one of the robbers. The only man in that cell block was the defendant, whom Hooker pointed out in the courtroom. In conclusion, Hooker testified that he never told the defendant, prior to his identification, to put on his glasses, coat and hat as he was already wearing these articles. He never heard Peters say he could not identify the accused as one of the robbers.

On cross-examination, Hooker said that Peters came to the police station at about 8:15 A.M. and said that one of the robbers wore glasses and a black suit and hat; that the victim left with the police and the defendant at 9:30 or 9:45 A.M. to go to Robbins and then to court at Midlothian where the complaint was signed at noon, after which everyone returned to the station at about 12:15 P.M. Hooker went on to say that when Peters came to the station, he asked him if his check was in the wallet. Hooker told him he would return the wallet after it and its contents were inventoried. Hooker went on to say that he never spoke with Peters in a room adjacent to the defendant's cell; that he did advise the defendant of his constitutional rights before Peters came to the police station; that the accused said he knew his rights, he had nothing to say, and he wanted to make a telephone call; that he would not allow the defendant to make any telephone calls at this time because he had not yet been booked; and that he told the defendant he could make any number of calls after he went before the judge. In conclusion, Hooker stated that he knew the defendant robbed Peters because he was an eyewitness to the crime but he did not tell the victim this until Peters had first identified the defendant. The court then denied the defendant's motion to suppress the identification testimony of the victim, Charles Peters.

At the trial of the case-in-chief before the jury, the State presented three witnesses: Peters, the victim; Captain Hooker; and Sergeant Nolan of the Phoenix Police Department. The

defense produced the defendant and Reverend Sherman S. Hill, a character witness.

Peters testified that he was robbed shortly after 6:00 A.M. on September 2, 1967, in the parking lot of a Phoenix, Illinois tavern; that he was set upon when he went for his car; that a man seized him by the shoulder, put a gun in his face, and demanded his money; and that he gave him his wallet whereupon the man told him to get in his car and leave. Peters also stated that he and the robber were facing each other and were only two feet apart; that the sun was starting to come up and artificial light was also provided by lights on the wall of the tavern located about ten feet from his car; that the conversation between the armed robber and himself took about one or two minutes; that the defendant sitting in the courtroom was the armed robber; and that he observed a commotion in the parking lot when he was driving away but kept going. The complaining witness also identified People's Exhibit 1 as being the weapon which the defendant held during the robbery and People's Exhibit 2 as being his payroll check stub which he had in his wallet as part of his check before the wallet was taken from him. Peters stated that he viewed several suspects in one-man confrontations at the police station before identifying the defendant as the armed robber. His wallet and its contents were returned to him at the station. Only the check stub was retained by the police for evidence.

On cross-examination, Peters testified that he had been drinking beer with co-workers from 11:30 P.M. on September 1, 1967, to about 6:00 A.M. on September 2, 1967; that he was held up by two men while getting into his car but he could not see the second man; that no young lady was with him at the time of the incident; and that when he drove away he saw no police officers in the parking lot but he did see some commotion there as he looked out his back window. In conclusion, Peters denied that he

had ever told the police in the station that he could not identify the defendant as one of the armed robbers.

Sergeant Samuel Nolan of the Phoenix Police Department testified that about 6:30 A.M. on September 2, 1967, he was on duty and was working with his superior, Captain Hooker; that they were not in uniform and were parked, in an unmarked squad car, across the street from a tavern in Phoenix; that he saw Peters leave the tavern and go to his car but two men were following him; that Peters thereafter put his hands in the air and got out of the car; that Nolan immediately drove into the parking lot and the two men began to run although Peters remained by his car; that one of the two running men was the defendant whom Nolan, in the police car with Hooker, was able to pin against a fence about a quarter of a block from the parking lot; and that Nolan never lost sight of the defendant from the first time he saw him until he placed him under arrest. Nolan went on to state that he conducted a search incidental to this arrest and found Peters' wallet in the defendant's pocket which wallet contained Peters' payroll check; that just prior to being pinned, the defendant threw a revolver over a fence but Captain Hooker was able to recover it; and that he recognized People's Exhibits 1 and 2, the revolver and the payroll check stub respectively, as being under the defendant's control when arrested.

On cross-examination, Nolan stated that when Peters left the tavern he had a young lady with him whom the officer had seen before in Phoenix but he did not know her name; that the lady was in Peters' car when the two men approached the victim; and that when Peters arrived at the station, Nolan told him they had caught the man who robbed him.

Captain Hooker corroborated much of Nolan's testimony regarding their being eyewitnesses to the armed robbery, the eventual arrest of the defendant shortly thereafter, and the

recovery of the loaded revolver. He also said that their unmarked police vehicle was approximately sixty to sixty-five feet from the victim's car; that he saw Peters leave the tavern in the company of a young woman whom he did not know; and that he also saw a man wearing a black hat and black plaid suit remove a gun from under his coat, open the door to Peters' car and point the weapon at the victim. Peters put his hands in the air and got out of the car. Thereafter, the armed robber looked in the direction of the unmarked police car, said something to his companion and both men fled. Hooker identified the defendant in the courtroom as the man who held the loaded revolver on September 2, 1967, and he also identified People's Exhibits 1 and 2 as being in the defendant's possession when arrested. The weapon and payroll check stub were admitted into evidence.

The defendant testified and denied any participation in the offense and stated that he was drinking with a friend, Henry Williams, from the evening of September 1, 1967 to the morning of September 2, 1967; that they eventually got to a tavern in Phoenix at about 5:00 A.M., bought a half-pint of whiskey to go, and left; and that they were drinking the whiskey outside and in the rear of the tavern when they heard someone in the parking lot yell for the police. The defendant also said that both he and Williams knew they were doing wrong by drinking in public so they threw the bottle away. The accused ran in one direction and his friend apparently returned to the tavern. The defendant then testified that the police immediately arrested him, but he did not have either a pistol or Peters' wallet in his possession. He had only his own wallet which the police took from him when he was arrested at about 5:30 A.M. on September 2, 1967. He went on to say that he always denied the armed robbery; that he was unable to find his friend, Henry Williams, at the time of the trial; that he never owned a pistol; and that he did not see Hooker pick up a

gun when he was arrested.

The Reverend Sherman S. Hill stated that he is an ordained minister in the Church of the Living God and his parish is in Joliet, Illinois; that he knew the defendant for about eleven years; and that the accused enjoyed a good reputation for truth and veracity and for being a peaceful and law-abiding citizen in the community in which the defendant resided.

Initially, the defendant asserts that his pre-trial identification by the victim in the police station was conducted in such a suggestive atmosphere as to deprive him of due process of law and a fair and impartial trial. This issue was presented to the trial court by way of the accused's unsuccessful pre-trial motion to suppress the identification testimony of the victim. Within the facts and circumstances of this case, the defendant is not aided by the recent constitutional principles regarding identification expressed in United States v. Wade, 388 U.S. 218 (1967); Gilbert v. California, 388 U.S. 263 (1967); Stovall v. Denno, 388 U.S. 293 (1967); and Foster v. California, 394 U.S. 440 (1969), chiefly relied upon by the defendant. In the cited cases the only evidence connecting the defendants with the crimes was the courtroom identification testimony of the eyewitnesses which the court held, based upon the totality of the circumstances in each case, might have been tainted by unnecessarily suggestive pre-trial lineups and showups or by the absence of defense counsel at the time the pre-trial identification confrontations were held. In the case at bar, however, two eyewitnesses to the crime, Captain Hooker and Sergeant Nolan, did not view the accused at any pre-trial lineup or showup. Their courtroom identification, independent of the victim's, was based upon their observations at the scene of the offense. They positively identified the defendant as one of the armed robbers. In addition, their eyewitness identification testimony was corroborated by two items of physical

evidence found in the defendant's possession when arrested, the weapon and the victim's wallet, and was further corroborated by the defendant's flight from the scene when the police arrived in their unmarked police vehicle. Within the facts of this case, we hold that the transmission of the in-court identification testimony of the victim was harmless error beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 24 (1967); People v. Blumenshine, 42 Ill. 2d 508, 514, 250 N.E. 2d 152, 155 (1969).

Secondly, the defendant contends that the refusal of the Phoenix, Illinois, police to permit him to communicate with an attorney or member of his family soon after his arrest was a denial of due process and a violation of Ill. Rev. Stat. (1967), ch. 38, §103-3 (a) which provides:

> "Persons who are arrested shall have the right to communicate with an attorney of their choice and a member of their family by making a reasonable number of telephone calls or in any other reasonable manner. Such communication shall be permitted within a reasonable time after arrival at the first place of custody."

Captain Hooker testified that he would not allow the accused to make any telephone calls until after he had been booked and taken before a judge. We agree with the defendant that the police did not comply with the statute. However, in light of the overwhelming evidence in this case damaging to the defendant, their technical violation of the statute is not prejudicial error.

Furthermore, in this case unlike Escobedo v. Illinois, 378 U.S. 478 (1964), the police did not carry out a process of interrogations lending itself to eliciting incriminating statements from the accused. There was no interrogation. Nor did the accused give any incriminating statements to the police. We find no merit in this contention.

The defendant also urges that Ill. Rev. Stat. (1967), ch. 38, §103-3 (b) was violated when the police took him to Midlothian and no telephone calls were permitted. This statute

provides:

> "In the event the accused is transferred to a new place of custody, his right to communicate with an attorney and a member of his family is renewed."

Since the defendant was apparently taken to Midlothian only for a preliminary hearing and thereafter was promptly returned to the Phoenix police station, we find that he was never transferred to a new place of custody. Accordingly, this contention cannot prevail.

Finally, the defendant urges that the State did not prove him guilty beyond a reasonable doubt. Specifically, he mentions inconsistencies in the testimony of the State's witnesses regarding the time of the crime, the period which elapsed from the commission of the offense until the defendant was taken before a judge in Midlothian, whether or not a woman was with the victim when the crime occurred, and whether the victim was robbed while standing outside his car or while sitting in it. As the State correctly points out in its brief, these alleged discrepancies do not address themselves to substantial issues regarding the fact of the robbery and the participation by the defendant. It is established law in Illinois that positive identification by one credible witness can be sufficient to convict although contradicted by the accused. People v. Boney, 28 Ill. 2d 505, 509, 192 N.E. 2d 920, 922 (1963); and People v. Washington, 26 Ill. 2d 207, 210, 186 N.E. 2d 259, 261 (1962). In the instant case, we have the identification testimony of two eyewitness police officers independent of the victim. All identification testimony was corroborated by the defendant's flight from the scene and by the physical evidence found in his possession when arrested shortly thereafter. See People v. Harris, 92 Ill. App. 2d 412, 416, 236 N.E. 2d 281, 283 (1968). Although a character witness did testify for the accused, it has been held that where the evidence is

sufficient to convict a defendant beyond a reasonable doubt, his conviction will not be set aside because of proof of previous good character. People v. Arbuckle, 413 Ill. 441, 445, 109 N.E. 2d 770, 772 (1953). Within the facts of this case, we find no sound reason to disturb the verdict of the jury.

The judgment is affirmed.

JUDGMENT AFFIRMED.

MC CORMICK, P.J., and BURKE, J., concur.

53577)
53578) Consolidated
53754)

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, vs. HENRY LEE JOHNSON, Defendant-Appellant.	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY. Honorable George N. Leighton and Honorable Saul A. Epton, Presiding.

MR. JUSTICE LYONS DELIVERED THE OPINION OF THE COURT.

Henry Lee Johnson was convicted, following a bench trial, of the offenses of theft and assault. Judgment was entered on the finding and he was sentenced to a term of one year in the House of Correction for the theft and fined $100.00, suspended, for the assault. In this appeal the defendant contends that he was not properly apprised of and did not knowingly and understandingly waive his right to a trial by jury. Defendant's second contention is that he was not proven guilty beyond a reasonable doubt. Finally, defendant appeals from an order revoking probation, to which he had been admitted and which had not terminated at the time of his conviction on the above specified offenses.

On November 19, 1965, defendant pleaded guilty to a charge of robbery and was admitted to probation. The term of probation was set at thirty-six months. On May 1, 1968, defendant was found guilty of the offenses of assault and theft. On July 19, 1968, following a hearing on a rule to show cause why probation should not be revoked, defendant was found to have violated the terms of his probation, such violation consisting of commission of the offenses for which he stood convicted. The probation was revoked and he was sentenced to a term of not less than one nor more than five years in the Illinois State Penitentiary for the offense of robbery.

On May 1, 1968, a preliminary hearing was had on the

complaints charging the defendant with assault and theft. Jeffries Warren, the victim, was the only witness called at the hearing and testified as follows.

At approximately 9:00 P.M. on the evening of March 8, 1968, Jeffries Warren entered the lighted vestibule of the apartment building in which he lived, located at 1525 West Adams Street in the City of Chicago, where he was accosted by two men. One placed an object in his back and the defendant, Johnson, facing him, said, "Where is it at _____ _____"? Warren responded by telling him that if it was money they were after they should reach in his pocket. Johnson then struck Warren in the eye with his fist and said, "We are going to kill you, _____ _____." A scuffle then ensued, primarily between Mr. Warren and Johnson, during the course of which Warren was struck three times with a rock kept in the vestibule and used as a doorstop. Each time the rock was directed by Johnson.

Warren broke loose and ran up the stairs toward his apartment and his assailants departed. He called the police and after they arrived and had taken a description of the attackers, Mr. Warren joined them in a search of the area. During the course of that search Warren identified the defendant as one of his attackers.

Finally, the victim testified that his assailants took $10.52 in currency, a package of cigarettes, and a leather case containing a metal comb and two nail files. Only the case and its contents were recovered.

This was all the testimony heard at the preliminary hearing and thereafter the following colloquy occurred:

THE CLERK: Henry Lee Johnson, you are charged with battery and theft; ready for trial?

MR. JOHNSON: Yes.

MR. BEAN: Ready for trial, plea of not guilty, waive trial by jury.

THE COURT: All right.

The prosecutor then requested a stipulation that the testimony of Mr. Warren at trial would be the same as that given on preliminary hearing. Counsel for the co-defendant assented and counsel for defendant Johnson stood mute.

Officer Albert Rowe of the Chicago Police Department, the only witness called by the State at trial, testified as follows. At approximately 9:35 P.M. on March 8, 1968, he was in a squad car with Mr. Warren in the vicinity of 1400 West Madison Street. Their purpose was to attempt to locate two men who had assaulted and robbed Mr. Warren. Two men fitting the description of the attackers were located on the street and Mr. Warren positively identified the defendant Johnson as one of the offenders. The other man, Turner, was not positively identified at this time, but since he fit the description given by Mr. Warren, he, along with Johnson, was given a Miranda warning and arrested. A search of Johnson uncovered a leather comb case and metal comb which the victim identified as that taken from him by the attackers. Mr. Warren did not identify Turner as the second offender until after they had arrived at the police station.

Henry Lee Johnson took the stand on his own behalf and testified as follows. He was home on the evening in question until approximately 8:50 P.M. when he left to go to a restaurant about a block away. He met the defendant Turner there and while they were standing on the street talking they were stopped by the police. The comb and case taken from him were obtained by him from Goodwill Industries, his place of employment, two to three weeks prior to this incident.

Defendant Robert Turner also testified. During his testimony he affirmed that Mr. Warren had identified Johnson on the street and denied having been with Johnson prior to his arrest. He stated that he was walking with his brother and

Johnson was a few feet ahead of them when he was stopped by the police.

Defendant Johnson's wife also testified and corroborated her husband's testimony regarding his having been at home until approximately 9:00 P.M.

In support of his contention that he was not adequately apprised of his right to a jury trial and that he did not knowingly and understandingly waive that right, defendant argues that the trial judge abdicated his constitutional duty to see that a jury waiver is knowingly and understandingly made. The record shows that defendant's counsel, in his presence, advised the trial court that a jury would be waived and the defendant made no objection. People v. Sailor, 43 Ill. 2d 256 (1969) completely refutes defendant's contention:

> "The record reveals that defendant's counsel, in her presence and without objection on her part, expressly advised the court that the plea was 'not guilty' and that a jury was waived. An accused ordinarily speaks and acts through his attorney, who stands in the role of agent, and defendant, by permitting her attorney, in her presence and without objection, to waive her right to a jury trial is deemed to have acquiesced in, and to be bound by, his action. (Citations omitted) As was observed by the court in Melero (99 Ill. App. 2d at 211, 212): 'The trial court was entitled to rely on the professional responsibility of defendant's attorney that when he informed the court that his client waived a jury, it was knowingly and understandingly consented to by his client. . . .'"

In his second contention, that he was not proven guilty beyond a reasonable doubt, defendant suggests two theories. First, he notes that when the prosecutor requested a stipulation that Mr. Warren's testimony would be the same at trial as at the preliminary hearing his counsel stood mute. He concludes from this fact that none of the testimony of the victim was admitted in evidence against him. This conclusion is erroneous. Counsel for the other defendant agreed to the stipulation and Johnson's counsel remained silent. By this silence counsel must be deemed

to have acquiesced in the stipulation thus binding his client by it.

Defendant's second theory is that since Mr. Warren failed to identify Turner as his second assailant at the time of the street confrontation, and failed to include Johnson's goatee in the description given to the police, the identification of Johnson must be viewed as untrustworthy. We do not agree. Mr. Warren had a better opportunity to observe Johnson as he stood in front of Warren in a lighted vestibule, whereas the other assailant was behind him. Further, the testimony of Warren, Officer Rowe, and even the defendant Turner make it clear that Warren was positive in his identification of Johnson at all times.

We conclude that the first two contentions raised by the defendant are without merit and the judgment of conviction is accordingly affirmed. We do not, therefore, reach defendant's third contention, that the revocation of his probation was improper as it was based upon an erroneous judgment of conviction in the assault and theft cases.

JUDGMENT AFFIRMED.

MC CORMICK, P.J., and BURKE, J., concur.

54024

PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,

v.

WILLIAM ALEXANDER AND ERNEST JOHNSON,
Defendants-Appellants.

Appeal from the Circuit Court of Cook County.

Glenn T. Johnson, AJ.

MR. PRESIDING JUSTICE DEMPSEY DELIVERED THE OPINION OF THE COURT.

The defendants were indicted for burglary. The defendants' counsel told the trial court that they wanted to plead guilty. The court informed them of their rights and the consequences of their plea. They persisted in their plea, the evidence was stipulated and they were found guilty. After a hearing in aggravation and mitigation which disclosed that the defendants had served terms in the County jail, the House of Correction, the Illinois State Farm and the State penitentiary, each one was sentenced to the penitentiary for three years to three years and one day. They were informed that they had a right to appeal and the public defender was appointed to represent them.

The public defender filed motions in this court with supporting briefs asking to withdraw as appeal counsel for each defendant. He stated that the only basis for appeal would be whether the trial court fully admonished the defendants of the consequences of their guilty pleas. He concluded that it did and that the appeal could not possibly be successful. After receiving these motions letters were

sent to the defendants, giving them adequate time to file any points they might choose to support their appeals. The time has expired and no word has been heard from Alexander. The letter to Johnson was returned by the warden of the penitentiary who said Johnson had been discharged and that his whereabouts were unknown.

We have examined the record and find that the appeals are without merit. Each defendant was informed of his rights and correctly and adequately admonished of the consequences of his plea and there is no other point upon which an appeal could be based.

The motions of the public defender to withdraw as counsel are allowed; the judgments are affirmed and the appeal is dismissed.

Appeal dismissed.

Schwarts and McNamara, JJ., concur.

Case Numbers 53706) Consolidated
53707) Appeal

In The

APPELLATE COURT OF ILLINOIS

First District

A.D. 1970

MARY KREMBS, Plaintiff, vs. THE COUNTY OF COOK, a body politic and corporate, Defendant THE VILLAGE OF NORTHBROOK, a municipal corporation, Intervenor-Defendant-Appellant. THE CITY OF HIGHLAND PARK, a municipal corporation, Intervenor-Defendant-Appellant.	Appeal from the Circuit Court of Cook County, Illinois County Department Law Division Honorable Edward F. Healy, Trial Judge

STOUDER, J.

In June, 1968, Mary Krembs, plaintiff, commenced this action in the Circuit Court of Cook County seeking to have certain zoning restrictions applicable to her property declared unconstitutional. The area involved was situated in the unincorporated area of Cook County and was contiguous to and within one and one half miles of the corporate boundaries of the Village of Northbrook and the City of Highland Park, appellants. By separate petitions the Village of Northbrook and City of Highland Park sought to intervene in said proceedings as party defendants under Chapter 110, Section 26.1 (1) (b), Illinois Revised Stat. 1967. The court denied each of the petitions for leave to intervene from which denials the Village of Northbrook and the City of Highland Park have perfected separate appeals. Such appeals have been consolidated in this court.

During the pendency of this appeal the case of Village of Mount Prospect vs. County of Cook, ____Ill. App. 2d_____, _____N.E. 2d_____, was decided and petition for leave to appeal to our Supreme Court was denied in December, 1969. The majority of a divided court held in the Mount Prospect case that the Village lacked statutory authority and hence municipal power to litigate with respect to county zoning regulations applicable to unincorporated areas even though contiguous to and within one and one half miles of the corporate boundaries of Mount Prospect. The same question is presented in this appeal and neither of the appellants have pointed out any reason for distinguishing the facts in this case from those in the Mount Prospect case. Rather they argue that this court should decline to follow the majority opinion in the Mount Prospect case and instead adopt the views of the dissenting opinion.

We have examined both opinions in the Mount Prospect case and are persuaded that the majority opinion ought to be followed. Whatever merit there may be to the claim of a municipality that it has a vital interest in protecting its contiguous territory against adverse affects of county zoning regulations is, we believe, a matter for the legislature.

In view of the complete discussion of this problem in the Mount Prospect case we find it unnecessary to re-examine the issues or add thereto.

For the foregoing reasons the judgments of the Circuit Court of Cook County denying leave to file intervening petitions is affirmed.

JUDGMENTS AFFIRMED.

Ryan, P.J., and
Alloy, J. concur.

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ABST.

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, vs. ROBERT E. DAVIDSON and JAMES BRYANT (Impleaded) Defendants-Appellants.	APPEAL FROM CIRCUIT COURT, COOK COUNTY. HON. SIDNEY A. JONES, JR., Presiding.

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT:

Defendants Davidson and Bryant were found guilty at a bench trial of the crimes of burglary and automobile theft; each was sentenced to a term of two years to five years in the penitentiary on the burglary conviction, and to a term of ninety days in the County Jail on the automobile theft conviction. On appeal they maintain that their arrest without warrant was made without reasonable grounds, rendering the subsequent search and seizure of evidence unlawful, and that the People failed to prove ownership of the automobile and of the store which was burglarized, as alleged in the indictment. (Also indicted with these defendants for the burglary and the automobile theft were Walter McLemore and Claude Johnson, both of whom pleaded guilty to the automobile theft charge and not guilty to the burglary charge, but neither of whom is involved in these appeals.)

A defense motion to suppress evidence seized by police upon defendants' arrest was denied. At the hearing on the motion, Chicago Police Officer Trumen Hale testified that he and his partner, Officer Anthony Natali, were cruising in their squad car at about 5:00 A.M. on June 5, 1967 when they received a radio communication of a burglary in progress in the 2200 block of West Monroe Street in Chicago. They were also informed by the dispatcher that the burglars were in the process of loading their automobile at the time. The officer testified that they arrived at the scene within two minutes

and that they proceeded into the alley common to Monroe and Madison Streets. As they entered the alley they observed an automobile advancing toward their vehicle with four men seated in the front seat.

Officer Hale testified that before the squad car and the other vehicle were brought to a halt, he observed articles piled on the rear seat of the other vehicle. He testified that as he and his partner alighted from the squad car and approached the other vehicle, two of the occupants of the other vehicle got out. The officer testified that he then noticed that the vent window of the other vehicle was broken and he observed numerous articles on the rear seat, including three portable television sets, eight large lamps and a radio. The four men, defendants Davidson and Bryant, and McLemore and Johnson, were placed under arrest and the articles on the rear seat of the vehicle were seized. It was later determined that the premises burglarized was 2225-27 West Madison Street.

At trial, Willie Bryant testified that sometime between 5:00 P.M., June 4, 1967 and 9:00 A.M., June 5, 1967, his white, four door 1960 Chevrolet automobile was stolen. The witness testified that he purchased the vehicle for $475 on July 7, 1966 from Marvel Motors and that there was $200 left to pay on it at the time of the theft. He identified his automobile at the police auto pound about two weeks after it was stolen.

Officer Natali testified that he and Officer Hale responded to a burglary in progress radio communication at about 5:10 A.M., on June 5, 1967, and proceeded in their squad car to the alley in the 2200 block common to Madison and Monroe Streets. They entered the alley and stopped a Chevrolet automobile advancing toward them with

four men seated in the front seat, Davidson, Bryant, Johnson and McLemore. As the officers alighted from their vehicle, two of the men got out either side of the Chevrolet and one of them attempted to flee. The officers then noticed numerous articles on the rear seat of the automobile, including lamps and television sets. The four men were then placed under arrest.

Lloyd Feldman testified that he owned a used furniture store at 2225-27 West Madison Street in Chicago and that between 5:30 A.M. and 6:30 A.M. on June 5, 1967 he learned that the store had been broken into. He testified that he later identified the items found in the Chevrolet as having been taken from the store.

Walter McLemore testified on his own behalf. He stated that he and Claude Johnson came upon the Chevrolet in the alley in question with its motor running and the articles already piled on the rear seat. They drove off in the vehicle, and then saw defendants Bryant and Davidson and offered them a ride. He further testified that a few minutes later the police arrived and placed the four men under arrest.

Defendant Davidson testified in his own behalf and stated that he met defendant Bryant in a tavern in the early morning of June 5, 1967 where they remained until the tavern closed. They then went to Leavitt and Madison Streets where they had something to eat, after which they walked south on Leavitt until they reached the alley in question. There they met Johnson and McLemore who were riding in the Chevrolet and were offered a ride. Bryant and Davidson entered the front seat of the automobile and a few seconds later the police arrived and placed all four men under arrest. The witness

denied any knowledge of the articles found on the back seat of the Chevrolet.

Defendants first maintain that the arrest made by the officers, without a warrant, was illegal since the officers had no reasonable grounds to effect the arrest, and that therefore the search and seizure of the articles on the rear seat of the Chevrolet was unlawful. We disagree.

A police officer may effect an arrest without a warrant where he has reasonable grounds to believe that the person is committing or has committed an offense. Ill. Rev. Stat. 1967, Chap. 38, Para. 107-2(c). To determine whether the officer had reasonable grounds to effect the arrest, an offense must have in fact been committed and the circumstances facing the officer and the knowledge had by him at the time must have been such as would lead a reasonable and prudent person to believe that the person sought to be arrested is committing or has committed the crime. People v. Asey; 85 Ill. App. 2d 210, 219.

The officers in the instant case received a radio communication of a burglary in progress and were advised that the burglars were in the process of loading their automobile at the time. The officers reached the scene within minutes, drove into the alley running behind the store being burglarized, and observed the Chevrolet moving toward them with four men seated in the front seat and articles piled on the rear seat. The time was shortly after 5:00 in the morning. The officers stopped the Chevrolet and as they alighted from their squad car, two of the occupants of the Chevrolet got out. The officers approached the Chevrolet, observed a broken vent window and noticed numerous articles of personal property piled on the rear seat, in open view of the officers. The four men were then placed

under arrest. It is clear that the officers had reasonable grounds to believe that the men had just committed the burglary reported to them over the radio, and to effect an arrest of the men. People v. LaBostrie, 14 Ill. 2d 617, 621.

Defendants cite extensively from a myriad of cases relating to the improper use of evidence at trial which was found as a direct result of an unlawful search. Those cases are factually distinguishable from the case at bar. See e.g., People v. Brocamp, 307 Ill. 448.

Defendants next contend that there was a variance between the indictment and the evidence as to the ownership of the Chevrolet. They state that the indictment alleges that Willie Bryant was the owner of the vehicle, whereas the evidence elicited from Willie Bryant showed that Marvel Motors held legal title to the vehicle and that Bryant was buying it on time. The Criminal Code defines an "owner" in this regard, as:

> "...a person, other than the offender, who has possession of or any other interest in the property involved, even though such interest or possession is unlawful, and without whose consent the offender has no authority to exert control over the property." Ill. Rev. Stat. 1967, Chap. 38, Para. 15-2.

Since the evidence showed that Bryant had both a possessory and an equitable interest in the Chevrolet, it was not necessary to prove the actual specific ownership of the vehicle. People v. Hansen, 28 Ill. 2d 322, 338-40.

Defendants' final contention is that there was a variance between the indictment and the evidence as to the ownership of the store burglarized. They contend that the indictment alleged ownership to have been in Lloyd Feldman, whereas the evidence

showed it to have been in the American Furniture Exchange.

The evidence is clear that Feldman was the owner of the store. Although he testified that he bought some of the articles taken in the burglary with funds of the American Furniture Exchange, he testified that he was the owner of the store and that he had always been in business as the American Furniture Exchange. Feldman had lawful possession and occupancy of the store, which is sufficient to sustain a conviction on a charge of burglary. People v. Foster, 30 Ill. 2d 106.

For these reasons the judgments are affirmed.

JUDGMENTS AFFIRMED.

McCORMICK, P.J., and LYONS, J., concur.

53535

MARTHA EVANS,

Plaintiff-Appellee,

vs.

RICHARD J. DALEY, Mayor of the City of Chicago and Local Liquor Control Commissioner, JOHN MARCIN, City Clerk of the City of Chicago and WILLIAM T. PRENDERGAST, City Collector of the City of Chicago,

Defendants-Appellants.

APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY.

HONORABLE EDWARD F. HEALY, Presiding.

MR. PRESIDING JUSTICE STAMOS DELIVERED THE OPINION OF THE COURT.

This appeal is taken by the defendants from a judgment granting plaintiff, Martha Evans, a writ of mandamus to compel issuance of a liquor license. Defendants' motion to dismiss was denied and judgment was entered for plaintiff after defendants filed their answer which reasserted defendants' objections and presented evidence in conformity therewith.

In 1966 plaintiff was issued a retailer's alcoholic liquor license. This license was subsequently revoked the same year by the Local Commissioner upon a finding that plaintiff's agents had permitted a patron to solicit for the purpose of prostitution. After affirmance by License Appeal Commission of the City of Chicago, the revocation order was reversed by the Circuit Court and the license reinstated. In Evans v. License Appeal Commission, 95 Ill. App.2d 121, ____ N.E.2d ____ (1968) the Circuit Court's judgment was affirmed.

Upon expiration of the reinstated license, plaintiff filed a renewal application on May 9, 1968. An investigation by the Chicago Police Department, License Unit, pursuant to the renewal application revealed that plaintiff was cohabitating with a man not her husband and based upon this finding, the application was denied by the Local Commissioner.

Plaintiff then filed this action alleging the 1966 revocation

and subsequent reinstatement. She further alleged that denial of the renewal application was arbitrary and capricious and prayed for a writ of mandamus to compel issuance. The defendant filed a motion to dismiss accompanied with plaintiff's signed statement that she was cohabitating with a man not her husband. The motion was denied and defendants realleged the same matter in their answer. After a presentation of evidence, the court entered judgment for plaintiff and defendant appeals.

OPINION

While no appearance or brief was filed by plaintiff in this court in response to defendants' appeal, we shall review the merits of this appeal rather than enter summary reversal. Daley v. Jack's Tivoli Liquor Lounge, Inc., First District, No. 52837 ____ Ill. App.2d ____, ____ N.E.2d ____ (1969).

The right to liquor license renewal is governed by Ill. Rev. Stat., ch. 43 § 119 (1967) which provides:

> "Any licensee may renew his license at the expiration thereof, provided he is then qualified to receive a license. . ."

The privilege to receive a license is conditioned by Ill. Rev. Stat., ch. 43 § 120 (1967) which provides:

> "No license of any kind issued by the State Commissioner or any local commission shall be issued to:
>
> * * *
>
> (2) Any person who is not of good character and reputation in the community in which he resides."

The defendants presented the signed statement of the plaintiff wherein she admitted to cohabitation with a man not her husband. This was not rebutted by the plaintiff. We consider the admitted conduct of the plaintiff to be within the prohibition of § 120 (2).

The plaintiff's allegations as to the 1966 revocation and subsequent litigation were irrelevant to the issues presented in the trial court in the instant action, since the plaintiff was denied

renewal on separate and distinct procedural and substantive grounds from the facts of the prior revocation.

The trial court should have granted defendants' motion to dismiss; therefore, we reverse the judgment and remand the cause with directions to dismiss the complaint.

JUDGMENT REVERSED AND REMANDED WITH DIRECTIONS.

DRUCKER and ENGLISH, JJ., concur.

(PUBLISH ABSTRACT ONLY).

53571

PEOPLE OF THE STATE OF ILLINOIS,)
)
Appellee,)
) APPEAL FROM THE
vs.) CIRCUIT COURT OF
) COOK COUNTY
JOHN STEPNEWSKI,)
)
Appellant.)

MR. PRESIDING JUSTICE BURMAN DELIVERED THE OPINION OF THE COURT.

The defendant, John Stepnewski, was charged by indictment with the offense of possession of burglary tools under Chapter 38, Section 19-2 of the Illinois Revised Statutes. He plead guilty and on February 7, 1967, a judgment was entered on the plea and he was placed on probation for two years.

The defendant was charged with violation of the conditions of his probation in that he was subsequently convicted of theft and was sentenced to serve nine months at Vandalia. A rule to show cause had been entered why his probation should not be terminated. He was represented by the Public Defender. Based on this theft conviction, the defendant's probation was revoked and he received a sentence in that cause of one to two years in the penitentiary. On November 15, 1968, we allowed a late notice of appeal as requested by the Public Defender.

On November 24, 1969, the Public Defender filed a motion after serving the defendant with a copy, for leave to withdraw from the case as counsel for the defendant, on the ground that the record revealed no appealable grounds for reversal. In support thereof, and pursuant to the ruling in the case of Anders v. California, 386 U.S.738, he attached a brief in support of his petition to withdraw in which he concluded from a review of the transcript of the common law record and the report of proceedings that the only basis for appeal would be whether the defendant was denied procedural due process of law in his probation violation hearing.

On December 4, 1969, the defendant was notified by this court of the motion of the Public Defender to withdraw and was sent a copy of said motion and of the attached brief and he was instructed that he had until February 1, 1970, to file any points he might choose to submit to us in support of this appeal. We have informed him that after such date we would make a full examination of all proceedings and decide whether there was any merit to the appeal and, if not, we would grant counsel's request to withdraw and affirm the judgment without further appointment of counsel. The defendant has not filed any additional points for our consideration of the appeal.

Where an order admitting a defendant to probation is sought to be revoked, the general procedure required to be followed is set forth in People v. Price, 24 Ill. App. 2d 364, and in later decisions and the provisions under Chapter 38, Section 117-3 of the Illinois Revised Statutes. Such guidelines are: defendant is entitled to a conscientious judicial determination according to accepted and well recognized methods upon the question whether his probation conditions imposed have been violated; defendant must also be notified of the alleged violations of his probation and must be given full opportunity to refute the charge of alleged violations.

The record discloses, in the instant case, that the defendant was informed of the alleged probation violation, and was present in court with his appointed attorney when the State presented evidence of his conviction of theft which occurred subsequent to his having been placed on probation. In view of the evidence of defendant's violation of probation, it appears that the trial court adhered to the applicable statute and the guidelines set forth in many appellate decisions. We find that

the trial court did not abuse its discretion in ordering the revocation of probation and sentencing of defendant.

We have thoroughly considered the Public Defender's brief in support of his motion to withdraw and have made a full examination of all the proceedings in accordance with the requirements of Anders v. California, 386 U.S.738. We have concluded that the revocation of the probation and sentencing of the defendant to the penitentiary to have been proper and should be affirmed.

JUDGMENT AFFIRMED.

MURPHY AND ADESKO, JJ. CONCUR.

(Abstract only)

No. 53589

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee,	)	APPEAL FROM THE
	)	CIRCUIT COURT OF
v.	)	COOK COUNTY.
WILLIE W. STEWARD, Defendant-Appellant.	)	HON. FRANK J. WILSON PRESIDING.

MR. JUSTICE SCHWARTZ DELIVERED THE OPINION OF THE COURT.

Defendant was charged in each of three indictments with the offense of armed robbery. At his arraignment separate pleas of not guilty were entered. When the cases were called for trial, however, the defendant chose to change his pleas and pleaded guilty to each indictment. The guilty pleas were accepted by the court and concurrent sentences of not less than four nor more than five years in the State Penitentiary were imposed. Defendant has chosen to appeal from the judgment of guilty entered on only one of the indictments.

The Public Defender appointed by the court to represent defendant on this appeal filed a motion for permission to withdraw as attorney of record, which motion was denied in People v. Steward, 121 Ill. App. 2d 279. We there held that the record did not provide the court with the information necessary to determine, pursuant to Anders v. California, 386 U.S. 738, whether any appeal by the defendant would be wholly frivolous. The Public Defender, stating that the record now is complete, has renewed his motion for permission to withdraw. Notice of that motion was mailed to defendant on November 19, 1970. Defendant has not responded.

A plea of guilty, voluntarily and understandingly entered, waives all defects not jurisdictional. People v. Scott,

29 Ill. 2d 429. Before accepting a plea of guilty, the court must inform the defendant of the consequences of his plea and the maximum penalty provided by law which may be imposed upon the acceptance of such plea. Ill. Rev. Stat., ch. 38, §115-2 (1969). The proceedings in open court must also establish that the defendant understands his rights and the nature of the charge against him. Supreme Court Rule 401(b), Ill. Rev. Stat., ch. 110A, §401(b) (1969). In the instant case the following colloquy took place when defendant's attorney informed the court that defendant wished to withdraw his plea of not guilty previously entered and to plead guilty to each charge:

> "THE COURT: Frank Amos and Willie Steward, your attorney advises me you wish to change your plea from not guilty to a plea of guilty to these three indictments, is that correct?
>
> MR. STEWARD: Yes, sir.
>
> . . . .
>
> THE COURT: When you plead guilty you automatically waive your right to a jury trial, a jury has already been impaneled yesterday, understand that?
>
> DEFENDANT STEWARD: Yes.
>
> . . . .
>
> THE COURT: Before accepting your plea of guilty it is my duty to advise both of you that on your plea of guilty to these three indictments, all three of them charging you with robbery while armed, you may be sent to the penitentiary for a term of years, it may be any number of years not less than two years on each indictment. Knowing that do you still persist in your pleas of guilty?
>
> DEFENDANT STEWARD: Yes."

The record shows that the defendant was fully informed by the court of the consequences of his guilty plea and that he per-

sisted in making such plea. Accordingly we conclude that the trial court properly accepted defendant's plea.

Our own review of the record convinces us that an appeal would be wholly frivolous and the Public Defender's motion is therefore allowed and the judgment is affirmed.

MOTION ALLOWED

McNAMARA, P.J. and DEMPSEY, J. concur.

53293

JAMES TERRY, Plaintiff-Appellee, vs. REBECCA TERRY, Defendant-Appellant.	APPEAL FROM CIRCUIT COURT COOK COUNTY. HONORABLE ALFONSE F. WELLS Presiding

MR. PRESIDING JUSTICE MC CORMICK DELIVERED THE OPINION OF THE COURT.

The plaintiff, James Terry, filed a complaint for divorce. After the defendant, Rebecca Terry, filed her answer, a trial date of July 18, 1968, was set. One week prior to the trial date counsel for the defendant informed plaintiff's counsel that the defendant was hospitalized and would be unable to attend the trial, and that he was requesting a continuance. On July 18, when the motion for continuance was made, counsel for plaintiff presented an order to the judge which was entered. The order read in pertinent part as follows:

> (a) That during the illness and confinement of the defendant, REBECCA TERRY, the affairs and business of the JOHNSON CAB CO., an Illinois corporation, be operated and controlled by the plaintiff herein, JAMES TERRY, until the further order of this Court; and that the said plaintiff account for his acts and doings as and while in the management of the said JOHNSON CAB CO., Inc., until the final hearing of this cause.
>
> (b) That the stock, records and books including the day-by-day ledger of the JOHNSON CAB CO.,Inc., now in possession of the defendant or her counsel be delivered to the Clerk of the Circuit Court of Cook County, forthwith; together with such other documents as may be used in the management of the said JOHNSON CAB CO.

It is undisputed that the order was entered without prior notice, without a petition, without hearing any evidence, and without bond.

Subparagraph (a) of the order amounts to an appointment of James Terry as receiver over the "affairs and business" of the Johnson Cab Company "during the illness and confinement of the defendant, Rebecca Terry," although the order was to remain in effect "until further order of" the court. This portion of the order is appealable under Supreme Court Rule 307, which provides:

> An appeal may be taken to the Appellate Court from an interlocutory order of court
> * * *
> (2) appointing or refusing to appoint a receiver or sequestrator;

Subparagraph (b) of the decretal order amounts to a mandatory injunction. The trial court was attempting to maintain the status quo pending the outcome of the divorce action. At one point the trial judge said, "I still say this Court has a right to grant the relief sought here merely to impound the stocks, books and records of the company until such time that the court can adjudicate." The judge later said, "I am requiring you, Mr. Freed, to deliver the books and records to the Clerk of the court for safe keeping." This portion of the order is also appealable under Supreme Court Rule 307, providing for appeals to this court from an interlocutory order "granting, modifying, refusing, dissolving, or refusing to dissolve or modify an injunction."

It has been held that this provision does not confer a right upon all parties to bring an interlocutory appeal. The interlocutory order must directly affect the merits of the controversy before it is appealable. In First Nat. Bank of Chicago v. Powers, 107 Ill. App. 2d 470, a guardian

ad litem sought to review a stay order which postponed the issue of the guardian's fees until the final adjudication of the merits of the matter before the court [the construction of a will and codicil.] The guardian brought an appeal seeking to obtain his fees prior to final adjudication of the controversy, and this court held that the order appealed from was not an injunction within the meaning of Rule 307(a) and said at page 472:

> "In the case before us, the order being appealed from does not affect the merits of the pending litigation since the sole person directly affected by the order is the Guardian Ad Litem himself." [Emphasis supplied.]

By contrast, in the present case the person directly affected by the order is the defendant in the divorce proceeding, not simply one who happens to be somehow involved in the mechanics of the lawsuit. An interlocutory injunction within the meaning of Rule 307(a) is one which will "preserve the rights of some one or more of the parties and continue the property and the rights therein in statu quo until the cause can be disposed of on the merits." Almon v. American Carloading Corp., 380 Ill. 524, 529. Subparagraph (b) of the instant order is therefore appealable under Rule 307.

Rule 307 provides that to perfect an appeal from the entry of an interlocutory order, a notice of appeal is to be filed within 30 days from the entry of the order, designated "Notice of Interlocutory Appeal." The notice in the present case was designated "Notice of Appeal," and therefore, did not accurately describe the nature of the order from which appeal was sought. Rules of the court are drafted in part to aid a court in obtaining as much relevant information as possible so that an informed

judgment can be rendered. Although the incorrect designation here is certainly not a critical error, we feel we should call attention to it.

Ill. Rev. Stat. 1967, ch. 22, § 54 provides in pertinent part:

> [B]efore any receiver shall be appointed the party making the application shall give bond to the adverse party in such penalty as the court or judge may order and with security to be approved by the court . . . provided, that bond need not be required, when for good cause shown, and upon notice and full hearing, the court is of opinion that a receiver ought to be appointed without such bond.

The reason for these stringent requirements is that the appointment of a receiver is a drastic remedy and should be made only after the court is satisfied that it is absolutely necessary and that there is an imminent danger of loss if the remedy is not employed. Steinwart v. Susman, 94 Ill. App. 2d 471, 476.

In the case before us there was no notice, no full hearing, no showing of "good cause," and no bond was required. It was known that the defendant was hospitalized, but there was no showing that a receivership was thereby required. Under these circumstances subparagraph (a) of the decretal order cannot be allowed to stand.

On July 18, 1968, the date the appealed-from order was entered, the statute then in effect [Ill. Rev. Stat. 1967, ch. 69, § 9] provided in pertinent part as follows:

> In all other cases, before a restraining order or an injunction may issue, the applicant shall give bond in such sum, upon such condition and with such security as may be deemed proper by the court or judge, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.

In Hoffman v. City of Evanston, 101 Ill. App. 2d 440, this court noted that prior to the 1967 amendment to the Injunction Act, section 9 had contained language providing that the requirement of posting bond could be waived "for good cause shown." In that case we held at page 446 that the deletion of the provision for waiving bond reflected the legislative intent that "before any restraining order or injunction is issued, a bond must be filed with the court." In effect, the 1967 amendment withdrew from courts the right to waive the posting of bond, and left the courts with the sole question of determining the proper amount of the bond. Since the amendment was in effect at the time the order in the instant case was entered, we must vacate that order and dissolve the injunction for failure to comply, among other things, with the requirement of posting bond.

Although it has not been pointed out by either the defendant or plaintiff, we note that as of August 28, 1969, section 9 of the above statute has again been amended, and now reads, in pertinent part:

> In all other cases, the court or judge, in his or its discretion, may before issuing a restraining order or a preliminary injunction, require the applicant to give bond in such sum, upon such condition and with such security as may be deemed proper by the court or judge, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained." [Emphasis supplied.]

This newest amendment may well have resulted from a desire to alter the conclusion reached in the Hoffman case. However, we are not passing upon the meaning of the amendment; we merely call attention to the fact that the section has again been amended since the decision in Hoffman,

which was October 30, 1968. That case dealt with statutory language which was then new and which existed as of the date the order in the instant case was entered, but is no longer in effect.

Under the facts in this case, and under the law existing at the time the order appealed from was entered, we must reverse the order of July 18, 1968. The order of the Circuit Court is reversed.

REVERSED.

LYONS, J., and BURKE, J., concur.

53718

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, vs. EDWARD THIGPEN, Defendant-Appellant.) APPEAL FROM CIRCUIT COURT, COOK COUNTY. HON. REGINALD J. HOLZER, Presiding.

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT:

Defendant was found guilty at a bench trial of the sale of a narcotic drug and sentenced to a term of ten years to fifteen years in the penitentiary. On appeal he contends that he was not proven guilty beyond a reasonable doubt.

Floyd Flemister, alias Albert Cross and hereinafter referred to by the latter name, testified that on March 30, 1967, he was engaged by the Chicago Police Department as a special employee in a narcotics transaction. At approximately 3:30 A.M. on that day, the witness went to a police station at 4800 South Wabash Avenue, where he was "strip searched" by Officers Crosier and Kelly. Neither narcotics nor currency having been found on his person, Cross was given ten pre-recorded one-dollar bills and one five-dollar bill with which to effect the purchase of narcotics.

Cross testified that he and the two officers then proceeded in an unmarked police car to 47th Street and Prairie Avenue in Chicago. He testified that he knew that this area of the city was frequented by narcotics addicts and peddlers because he had been a user of narcotics. He further testified that he knew the defendant only casually and had seen him in the area prior to March 30th.

The police vehicle stopped on the east side of Prairie Avenue, Cross alighted, walked to 47th Street, and east along the south side of 47th Street until he reached a restaurant called "The Hub," in front of which the defendant was standing. The police officers

had followed Cross in their vehicle as he walked, and stationed themselves across the street from the restaurant where they observed Cross meet the defendant in front of the establishment. There was evidence that the area around the restaurant was well lighted by the lights of the restaurant itself and by mercury city street lights.

Cross testified that he told the defendant that he wanted "to cop," meaning that he wanted to purchase narcotics, and that the defendant asked him how much money he had. Cross told the defendant that he had $15, and testified that he then counted out the pre-recorded bills and handed them to the defendant, all of which was accomplished in full view of the police officers. Defendant and Cross then walked over to a man named Hobbs, who was also standing in front of the restaurant, and defendant counted out the money given to him by Cross and handed it to Hobbs. Hobbs in turn handed the defendant a tinfoil package. All of this was again transacted in full view of the officers.

After the exchange, defendant and Cross walked to another street, followed by the officers in the police vehicle. Defendant then handed the tinfoil package to Cross and walked away. Cross turned the package over to the officers who had witnessed the second exchange from their police car parked nearby. A field test of the contents of the package revealed that it was narcotics.

In the meantime, defendant returned to The Hub where he met Hobbs. Defendant and Hobbs were walking to a nearby drug store when they were apprehended by Officers Crosier and Kelly and placed under arrest. Hobbs was searched and $14 of the marked money was found on his person. No money was apparently found on defendant when he was searched after his arrest.

The account of the transaction given at trial by Officers Crosier and Kelly substantially corresponded to that given by Cross.

Defendant's account of the transaction was that, after Cross told him that he had the $15, the defendant walked over to Hobbs, unaccompanied by Cross, and asked Hobbs "if he had anything." Hobbs replied in the affirmative, and stated that he would not sell it directly to Cross because he did not know him, but that he would sell it to defendant. The defendant testified that he returned to Cross, told him of the situation and asked Cross, "What's in it for me?" He testified that Cross replied, "I'll give you a piece of it," the witness testifying that Cross meant that the defendant would receive a portion of the narcotics for his efforts, since defendant was also using narcotics at the time. Defendant testified that Cross counted the money and handed it to him, whereupon defendant turned to Hobbs and gave him the money for which he received the narcotics.

After the exchange, the defendant and Cross walked to another street where defendant handed Cross the tinfoil package and asked Cross where he was going. Defendant testified that Cross told him that he had to wait where he was because he had arranged to meet a friend. Defendant stated that he became "suspicious" because of what Cross told him and walked away without claiming the portion of the narcotics which he testified had been promised by Cross. He testified that he returned to The Hub where he met Hobbs, and that he and Hobbs were walking to a nearby drug store when they were arrested.

Defendant contends that he was not proven guilty beyond a reasonable doubt for the reason that the evidence showed that he

acted only as agent for the purchaser, not for the seller, and that therefore he cannot be held liable for a sale of narcotics.

It is well settled that a party who acts in the capacity as an agent or a middleman in a narcotics transaction may be found guilty of the sale of the narcotics, pursuant to the Uniform Narcotic Drug Act in force in this State. Section 22-2-11 of the Criminal Code defines a sale of narcotics as:

> "...traffic in, barter, exchange, or gift, or offer therefor, and each such transaction made by any person whether as principal, proprietor, broker, agent, servant or employee." Ill. Rev. Stat. 1965, Chap. 38, Para. 22-2-11.

The scope of Section 22-2-11 (then Para. 192.1(10) of Chap. 38 of the 1955 Illinois Revised Statutes) was construed in People v. Shannon, 15 Ill. 2d 494, where the defendant raised the same contention raised herein. The Court stated, at pages 496-97:

> "We interpret the meaning of the word 'sale,' as defined by the act, to be much broader in scope than that usually given to it in other branches of the law. Admittedly, the defendant took the role of at least an agent, and the act specifically declares an agent in a narcotics transaction to be a seller. We are of the opinion that the definition shows a legislative intent that the act of a person whether as agent, either for the seller or the purchaser, or as a go-between, in such a transaction constitutes a sale. Since the agency was admitted and proved, the conviction...for ...selling was established beyond a reasonable doubt."

Apart from the evidence adduced by the People, showing that defendant and Hobbs had an acquaintance prior to March 30, 1967 and that the reasonable inference therefrom was that defendant acted as agent for Hobbs in procuring the sale herein, defendant's own testimony at trial and his admission on appeal bring him squarely within the scope of the statute and the holding in the Shannon case. See also People v. Collins, 25 Ill. 2d 302, 304; People v. Abbott, 110 Ill. App. 2d 462, 472.

Defendant testified that he was promised a portion of the

narcotics by Cross, but that he did not receive the promised portion. The fact that defendant was not compensated for his services does not absolve him from guilt. See People v. Robinson, 14 Ill. 2d 325, 332.

The judgment is affirmed.

JUDGMENT AFFIRMED.

MC CORMICK, P.J., and LYONS, J., concur.

54221

PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff- Appellee,

vs.

JOHN O'NEAL,

Defendant -Appellant.

APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY

HON. FRANK J. WILSON, JUDGE PRESIDING

MR. PRESIDING JUSTICE BURMAN DELIVERED THE OPINION OF THE COURT.

The defendant, John O'Neal, was convicted of burglary after a plea of guilty and sentenced to serve a term of two years to two years and one day in the penitentiary.

The defendant filed a notice of appeal and the Public Defender was appointed as his counsel. On September 30, 1969, the Public Defender filed a motion, after serving the defendant with a copy, for leave to withdraw as counsel for the defendant on the ground that an appeal is without merit.

In support thereof, and pursuant to the ruling in the case of Anders v. California, 386 U.S.738, he attached a brief in which he concluded from a review of the record and a report of the proceedings, that the only basis for an appeal would be that the plea of guilty was not voluntarily and understandingly made.

A plea of guilty can only be entered after the defendant has been advised by the court of his rights and the consequences of his plea. Under Chapter 38 Section 115-2 of the Criminal Code, the requirements to be given a defendant on a plea of guilty are set forth as follows:

> (a) Before or during a trial a plea of guilty may be accepted when:
>
> 1. The defendant enters a plea of guilty in the court.
>
> 2. The court has informed the defendant of the consequences of his plea and the maximum penalty provided by law which may be imposed upon acceptance of such plea.

The colloquy proceedings that took place between the defendant and the court before the plea of guilty was accepted are specifically set forth in the brief. The Public Defender concludes therefrom that the court adhered to the requirements of the statute and of the Supreme Court rule 401(b) and the requirements set forth in People v. Kontopoulis, 26 Ill. 2d 388 and in People v. Bullheimer, 37 Ill. 2d 24, and we agree.

The record shows that the trial judge discussed with the defendant the significance of the plea of guilty before accepting it and advised the defendant of the consequences of a guilty finding. It also appears that the defendant's plea of guilty was voluntarily and understandingly made.

The defendant was notified by this court of the Public Defender's motion for leave to withdraw as his counsel and a copy of his motion and brief was attached. The defendant was informed that he had until February 18, 1970, to file any points he might have in support of his appeal. We informed him that after such date we would make a full examination of all of the proceedings and decide whether the appeal is wholly frivolous and if we so find we may grant the Public Defender's request for withdrawal and affirm the judgment without further appointment of counsel.

We have made a complete examination of all of the proceedings in accordance with the requirements of Anders v. California, 386 U.S.738 and have concluded there is no merit to this appeal. The Public Defender's request for leave to withdraw as counsel for the defendant is therefore granted, and the judgment of conviction is affirmed.

JUDGMENT AFFIRMED.

MURPHY AND ADESKO, JJ. CONCUR.

(Abstract only)

121 I.A.2 422 (2)

No. 53569

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee,	APPEAL FROM THE CIRCUIT COURT OF
v.	COOK COUNTY.
MELVIN THOMAS, Defendant-Appellant.	HON. REGINALD J. HOLZER PRESIDING.

MR. JUSTICE SCHWARTZ DELIVERED THE OPINION OF THE COURT.

On December 15, 1966, defendant entered a plea of guilty to a charge of burglary. Despite a criminal record of fourteen misdemeanor convictions he was placed on probation for one year. While on probation he was convicted of robbery and sentenced to the penitentiary for a term of one to four years. On December 5, 1967 his probation granted in the burglary case was revoked and a sentence of six to eight years was imposed, to run consecutively with the sentence he received on his conviction for robbery. The sole contention on appeal is that the latter sentence is too severe.

The burglary indictment charges that on September 17, 1966 defendant knowingly entered a railroad car containing frozen meats with the intent to commit the crime of theft. A policeman observed defendant reaching into the railroad car which had been locked and sealed and immediately placed him under arrest. The evidence in the robbery case shows that the defendant was one of three men armed with revolvers who held up a grocery store at 39 North Kedzie Avenue in the City of Chicago on February 17, 1967.

The power of a court to sentence on a finding that probation has been violated is defined by statute as follows:

> "If the court determines that a condition of probation has been violated, the court may alter the conditions of probation or imprison the probationer for a term not to exceed the maximum penalty for the offense of which the probationer was convicted." Ill. Rev. Stat., ch. 38, §117-3(d), (1967).

The offense of burglary is punishable by imprisonment in the penitentiary for any indeterminate term with a minimum of not less than one year. Ill. Rev. Stat., ch. 38, §19-1(b), (1967). Where it is contended that a sentence within the statutory limits is excessive, a reviewing court will exercise restraint unless the punishment imposed is greatly at variance with the spirit and purpose of the law and the constitutional mandate requiring that all penalties be apportioned to the nature of the offense. People v. Hampton, 44 Ill. 2d 41, 253 N.E. 2d 385, and cases cited therein; People v. Zito, Ill. App. Ct. Docket No. 53452 (1st Dist.); ILL. CONST., art. II, §11.

In the case before us the record reveals that a major factor in the short probationary term imposed was that the burglary conviction was defendant's first felony, although he had a long record of misdemeanors. The purpose of probation is to afford an unhardened person convicted of a crime an opportunity to rehabilitate himself under the supervision of a probation officer without institutional confinement. People v. Tadla, 110 Ill. App. 2d 119, 249 N.E. 2d 155. The robbery which constitutes the probation violation in the instant case occurred approximately two months after defendant was placed on probation. The granting of a probationary term only defers the imposition of sentence as to the matter wherein probation was granted. People v. Smith, 105 Ill. App. 2d

14, 245 N.E. 2d 13; People v. White, 93 Ill. App. 2d 283, 235 N.E. 2d 393; People v. Morgan, 55 Ill. App. 2d 157, 204 N.E. 2d 314. In view of the defendant's long criminal record the sentence of six to eight years is not excessive. Accordingly the judgment of the trial court is affirmed.

JUDGMENT AFFIRMED

DEMPSEY, P.J. and McNAMARA, J. concur.

121 I.A.2 444

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss:
Second District)

At a session of the Appellate Court, begun and held at Elgin, on the 1st day of December, in the year of our Lord one thousand nine hundred and sixty-nine, within and for the Second District of Illinois:

Present -- Honorable MEL ABRAHAMSON, Acting Presiding Justice
Honorable GLENN K. SEIDENFELD, Justice
Honorable THOMAS J. MORAN, Justice
HOWARD K. KELLETT, Clerk
HARRY E. BOOTH, Sheriff

BE IT REMEMBERED, that afterwards, to-wit: On MAR 19 1970 the Opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, viz:

No. 69 148

Abstract

IN THE

APPELLATE COURT OF ILLINOIS

SECOND JUDICIAL DISTRICT

APPLIANCE BUYERS CREDIT CORPORATION,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Appeal from the
	)	Circuit Court of
PARK STATE BANK,	)	the 17th Judicial
	)	Circuit, Winnebago
Defendant-Appellee,	)	County, Illinois.
	)	
v.	)	
	)	
PARK STATE BANK,	)	
	)	
Third Party Plaintiff-Appellee,	)	
	)	
v.	)	
	)	
CENTRAL NATIONAL BANK & TRUST COMPANY,	)	
	)	
Third Party Defendant-Appellant.	)	

MR. JUSTICE ABRAHAMSON DELIVERED THE OPINION OF THE COURT.

This is an appeal brought by the third-party defendant, Central National Bank and Trust Company of Rockford (hereafter called "Central") from a judgment order entered April 17, 1969, in favor of the third-party plaintiff, Park State Bank, (hereinafter called "Park") in the sum of $7600 and interest and involves an interpretation of sections 4-301 and 4-302 of the Uniform Commercial Code (Ill. Rev. Stat., 1967, ch. 26, sec. 4-301 and 4-302).

On May 22, 1967, Anthony Zdeb, the owner of a business known as The Electronic Mart in Loves Park, drew a check in the amount of $14,386.51 on his account at Central payable to Appliance Buyers Credit Corporation. The check was presented for payment but returned to the payee because Zdeb did not have sufficient funds at Central to pay the check. On June 6, Zdeb notified Appliance that he did not have enough money to pay the check but did have $8,000 to apply on his account. Appliance arranged to go to Loves Park on June 7 to pick up the $8,000 but insisted that payment be made by bank draft or cashier's check.

At 9:30 A.M. on June 7, Zdeb went to Park, located near his place of business, and talked to Mr. Frank Marconi, a vice president of Park. Zdeb requested a bank draft in the amount of $8,000 payable to Appliance and offered to pay for it with his personal check on Central for $7,600 and cash. Marconi knew Zdeb slightly but he did not have an account at Park. Marconi directed a bank teller to telephone Central to inquire as to Zdeb's account and she was advised that the check was "good". Marconi then authorized the issuance of a bank draft in the amount of $8,000 payable to Appliance that was delivered to them by Zdeb shortly thereafter. Park deposited Zdeb's check for collection on June 7 and it was processed through local clearing procedures and received by Central on the morning of June 8.

On Friday morning, June 9, the check was given to Mr. Philip Pagani, the president of Central, by his bookkeeping department since it was discovered that the balance in Zdeb's account was approximately $150 less than the amount of the check. After an unsuccessful effort to reach Zdeb by telephone, Philip Pagani gave the check to his brother, Sam Pagani, a vice president of Central, and instructed him to contact

Zdeb. Sam Pagani talked to Zdeb around 2:00 P. M. by telephone and Zdeb promised to make a deposit before 7:30 P. M. to cover the check. Sam then placed his initials on the check to indicate approval of payment and returned it to bookkeeping. Philip Pagani had on earlier occasions approved checks from Zdeb that were overdrawn on his assurance that covering deposits would be made.

Central was closed on June 10 and 11 but on Monday, June 12, Sam Pagani checked Zdeb's account and discovered that he had not made the promised deposit. Sam retrieved the check, attempted to eradicate his initials and personally carried it to Park. He arrived at Marconi's desk at approximately 11:30 A. M. on Monday and notified him that there were not sufficient funds in Zdeb's account and that therefore Central would not honor the check. After some conversation, Marconi gave Sam Pagani a cashier's check for $7,600 to cover the settlement. Zdeb, in the meantime, had visited his attorney the afternoon of Friday, June 7, and signed a petition in bankruptcy that was hurriedly filed, without schedules, that same date. On June 12 and 13 Central issued cashier's checks on three different accounts maintained by Zdeb and his wife and applied all of the money in the accounts toward notes held by Central from Zdeb.

Park subsequently stopped payment on the bank draft to Appliance who filed suit against them as a result. Park filed a third party complaint against Central on the grounds that their refusal to honor Zdeb's check was illegal. At the conclusion of a bench trial, the court found in favor of Appliance and against Park on the complaint and in favor of Park and against Central on the third party complaint.

Part 3 of Section 4 of the Uniform Commercial Code is entitled "Collection of Items: Payor Banks". Sub-section 4-301 provides in part as follows:

> "4-301. Deferred Posting; Recovery of Payment by Return of Items; Time of Dishonor
>
> (1) Where an authorized settlement for a demand item (other than a documentary draft) received by a payor bank otherwise than for immediate payment over the counter has been made before midnight of the banking day of receipt the payor bank may revoke the settlement and recover any payment if before it has made final payment . . . and before its midnight deadline it
>
> (a) returns the item; or
> (b) sends written notice of dishonor ornonpayment if the item is held for protest or is otherwise unavailable for return . . . .
>
> (4) An item is returned:
>
> (a) As to an item received through a clearing house, when it is delivered to the presenting or last collecting bank or to the clearing house or is sent or delivered in accordance with its rules; . . ."

Section 4-104 (h) of the Code defines midnight deadline "with respect to a bank is midnight on its next banking day following the banking day on which it receives the relevant item . . ."

Section 4-302 provides:

> "Payor Bank's Responsibility for Late Return of Item: In the absence of a valid defense such as breach of a presentment warranty . . . settlement effected or the like, if an item is presented and received by a payor bank the bank is accountable for the amount of (a) a demand item . . . if the bank . . . retains the item beyond midnight of the banking day of receipt without settling for it or . . . does not pay or return the item or send notice of dishonor until after its midnight deadline; . . ."

The term "accountable" as used in this section has been interpreted as synonymous with "liable". Rock Island Sales v. Empire Packing, 32 Ill. 2d 269, 272.

Under the facts of this case, it would appear that Central had until midnight, June 9, to either pay or dishonor Zdeb's check since it had received it through clearing on the prior day. Central

maintains, however, that the check was "returned" within the time limits since it had been physically delivered to Park by Monday, June 12, the earliest date that Park would have received it had it been returned through clearings. In support of that contention, Central points out that the Uniform Commercial Code Comment to Section 4-301 (4) states that the sub-section "leaves banks free to agree upon manner of returning items . . ." and that they had offered ample evidence that banks in Rockford hand carried checks as part of their normal procedures. They also cite section 4-212 (1) to the effect that a bank may revoke a provisional settlement by its midnight deadline "or within a longer reasonable time" but since that section relates specifically to depository or collecting banks it has no application to this case.

The evidence that prevailing banking procedures in the Rockford area included the personal return of dishonored checks was scarcely overwhelming. Philip Pagani testified that "It has been done" and another local banker, appearing for Central, stated "I think this has happened". In any event, Section 4-301 provides that the return of an item by a payor bank, even by local rules, must be made "before its midnight deadline". Therefore, the practice in the local area for the return of checks is not material as to the effect of Section 4-301 since no method of return was employed until after the deadline had passed.

Central also points out that the definition of "send" as included in the general provisions of the Uniform Commercial Code states that "The receipt of any writing or notice within the time at which it would have arrived if properly sent has the effect of a proper sending".

(Ill. Rev. Stat. ch. 26, sec. 1-201 (38)). However, section 1-201 provides that the definitions are applicable "unless the context otherwise requires. . . ." Section 1-201 (38) states that "send" means "to deposit in the mail or deliver for transmission by any other usual means of communication . . . ." and the context of Sections 4-301 and 4-302 require a more precise definition as to when an item is properly returned or written notice of dishonor made.

The Rock Island case already cited appears to be the only Illinois case on Section 4-302 to date. In that case, the payor bank received a check through clearings on Thursday, September 27, 1962. Although there were insufficient funds to pay the check, the bank held it until Tuesday, October 2, on the assurance of the maker that additional funds would be deposited. It then mailed the check "N. S. F." and sent a notice of dishonor by telegram to the Federal Reserve Bank. The court held that the payor bank was liable to the payee of the check on the basis of section 4-302 and stated as follows at pages 273 and 274:

> The role of a payor bank in the collection process . . . is crucial. It knows whether or not the drawer has funds available to pay the item. The legislature could have considered that the failure of such a bank to meet its deadline is likely to be due to factors other than negligence, and that the relationship between a payor bank and its customer may so influence its conduct as to cause a conscious disregard of its statutory duty. The present case is illustrative. The defendant, in its position as a payor bank, deliberately aligned itself with its customer in order to protect that customer's credit and consciously disregarded the duty imposed upon it."

We feel that the principles of the Rock Island case are pertinent here. Central was aware that Zdeb's account was overdrawn

by the morning of June 9. It did not, however, take immediate action to revoke settlement of the check, as provided in the Code, but elected to act on the promise of their customer to deposit sufficient funds to cover the item. At that point, it assumed a risk that the customer would in fact perform his promise. As in the Rock Island case, the payor bank "aligned itself" with its customer in disregard of its statutory duty even though it had prior knowledge of his financial difficulties.

It is this precise practice that Section 3-402 attempts to correct by the imposition of absolute liability on the payor bank. In place of the requirement that an item be returned by the midnight deadline, Central would substitute a rule that it be returned within "a reasonable time". Such an interpretation would, in effect, be a return to the doctrine that the payor bank be liable only for its proven negligence and contravene the language and intent of the Code.

For the reasons stated, the judgment of the trial court will be affirmed.

JUDGMENT AFFIRMED.

MORAN and SEIDENFELD, JJ, concur.